FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

Statement of Commissioner Cynthia L. Bauerly on the Proposal to Commence a Rulemaking to Address Electioneering Communication Disclosure Rules

October 4, 2012

When a panel opinion of the United States Court of Appeals for the District of Columbia Circuit states that "neither the court nor the parties understand" part of the Commission's regulation for disclosing funding for electioneering communications and that the Agency's adoption of that same regulation "has raised as many questions as it purported to answer," it is time for the Commission to open a rulemaking.[1]

For well over a year, the Commission has been engaged in litigation over 11 C.F.R. § 104.20(c)(9), our regulation governing disclosure requirements for corporations and labor organizations that fund electioneering communications. In *Van Hollen v. FEC*,[2] the United States District Court for the District of Columbia found the regulation to be invalid. Although the Commission did not appeal the ruling, other participants in the litigation did and on September 18, 2012, the United States Court of Appeals for the District of Columbia Circuit reversed the decision of the United States District Court for the District of Columbia and remanded the case to the district court. On September 20, 2012, the district court ordered the Commission to advise the court whether the Commission "intends to pursue rulemaking or defend the current regulation."[3]

In overturning the district court's decision, the court of appeals acknowledged that "Indeed, it is doubtful that, in enacting 2 U.S.C. § 434(f), Congress even anticipated the circumstances that the FEC faced when it promulgated 11 C.F.R. § 104.20(c)(9)."[4] The "circumstances" to which the court was referring was the decision in *Wisconsin Right to Life v. FEC*.[5] These circumstances have changed again with the decision in *Citizens United v. FEC*,[6] which was far more disruptive to the status quo than *Wisconsin Right to Life*. The court of appeals also conceded that "neither the court nor the parties understand" certain aspects of the

[1] Center for Individual Freedom v. Van Hollen, No. 1:11-cv-00766, slip op. at 5 (D.C. Cir. Sept. 18, 2012) (per curiam).
[2] 851 F. Supp. 2d 69 (D.D.C. 2012).
[3] Van Hollen v. FEC, No. 11-cv-00766-ABJ (D.D.C. Sept. 20, 2012) (order to file status report).
[4] *Center for Individual Freedom*, slip op. at 5.
[5] 551 U.S. 449 (2007); *see also* Explanation and Justification for Final Rules on Electioneering Communications, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007).
[6] Citizens United v. FEC, 558 U.S. 310 (2010).

existing rule and that the adoption of the rules "raised as many questions as it purported to answer."[7]

Today the Commission again deadlocked on whether to commence a rulemaking to address 11 C.F.R. § 104.20(c)(9). We've been here before and this would appear to be our third strike. It seemed obvious to me after *Citizens United* and *SpeechNow.org v. FEC*,[8] that we should have reevaluated several of our reporting rules. In January of 2011, the Commission considered two competing notices of proposed rulemakings (NPRMs) responding to *Citizens United*, neither of which received a majority of the Commission's votes. The version I supported offered a comprehensive approach that would have sought public comment with respect to the rules governing the reporting of independent expenditures and electioneering communications including proposed alternatives relating to the regulation at 11 C.F.R. § 104.20. Some months later, I supported a scaled back approach that would still have sought public comment regarding our reporting rules. But that second attempt did not garner the support of a majority of the Commission.

The decision in *Van Hollen v. FEC* punctuates the need for a rulemaking to reconsider our reporting regime given the current state of the law. The court of appeals noted that there is confusion about this regulation – confusion that the Commission could resolve by undertaking a rulemaking. We should open a rulemaking to thoroughly evaluate our electioneering communications reporting rules, hear and consider public comments on the topic, and either revise those rules or fully explain their meaning in the contemporary legal environment. Neither the public nor those who report under this provision are well served by ignoring these issues.

[7] *Center for Individual Freedom*, slip op. at 5.
[8] SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010) (en banc).